

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 07Feb2002

Case No.: 2001-BLA-00300

In the Matter of

CHARLES LAUDENSLAGER

Claimant

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS**

Party-in-Interest

Appearances:

Helen M. Koschoff, Esq.
For the Claimant

Theresa C. Timlin, Esq.
For the Director

Before: PAUL H. TEITLER
Administrative Law Judge

**DECISION AND ORDER -- DENYING REQUEST FOR MODIFICATION
AND DENYING BENEFITS**

This proceeding arises from a claim for benefits under 30 U.S.C. §§ 901-945. In accordance with the Act and regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis. Benefits are also awardable to the survivors of persons whose death was caused by pneumoconiosis, and for claims filed prior to January 1, 1982, to the survivors of persons who were totally disabled from pneumoconiosis at the time of the deaths. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment. It is commonly known as black lung.

Procedural History

Claimant requested a hearing before this Office on November 19, 2000 (DX 98) following the denial on November 6, 2000 (DX 97) by the Director, Office of Workers' Compensation Programs of Claimant's September 25, 1999 request for modification of the denial of benefits on this claim (DX 145). This request for modification followed a second decision by the Benefits Review Board (Board) affirming the denial of benefits (DX 93). The claim was originally filed on September 27, 1993 and denied, following a hearing, by Administrative Law Judge Robert D. Kaplan on July 24, 1995 (DX 47). In that determination, Judge Kaplan found Claimant had established the presence of pneumoconiosis which arose out of coal mine employment by the chest x-ray evidence of record. The Board affirmed that denial of benefits on May 30, 1996 (DX 58).

Subsequently, Claimant submitted additional evidence and requested modification of the denial of benefits. On April 16, 1998, Judge Kaplan denied the request for modification and denied the claim for benefits. Judge Kaplan found Claimant had established total disability by one conforming pulmonary function study included in the record. Judge Kaplan further found, however, that Dr. Kraynak's medical opinion report, the only evidence of record which concluded Claimant was totally disabled due to pneumoconiosis, was flawed in several respects. Therefore, Judge Kaplan accorded little weight to Dr. Kraynak's opinion and found, consequently, that Claimant had not established by a preponderance of the current or prior medical evidence of record that pneumoconiosis was a substantial contributor to Claimant's total disability (DX 86).

Claimant appealed again to the Board which affirmed Judge Kaplan's denial in a Decision and Order dated September 29, 1999 (DX 93). The Board found Judge Kaplan's determination that Claimant did not satisfy his burden of proving that pneumoconiosis is a substantial contributor to his total disability was rational and supported by substantial evidence.

On September 25, 2000, Claimant submitted additional evidence and requested modification (DX 94). Claimant's additional evidence was a letter dated September 23, 2000 from Dr. Kraynak in which he addressed the deficiencies noted by Judge Kaplan in the April, 1998 denial. The Office of Workers' Compensation (OWCP) reviewed this letter and the request for modification and found this doctor's statement discussed medical evidence that had already been submitted, considered and ruled upon by the Office of Administrative Law Judges and the Benefits Review Board. Consequently, the District Director, OWCP, issued a Proposed Decision and Order Denying the Request for Modification on November 6, 2000 (DX 97). Claimant then requested a hearing before this Office on November 19, 2000 (DX 98) and the matter was referred on December 15, 2000 (DX 100).

Modification

Claimant's request for modification is governed by Section 725.310 of the regulations which provides that any party may request modification of the denial of a claim

if such request is filed within one year of the denial. Under Section 725.310(a), the terms of the award or denial of benefits can be reconsidered if the party asking for modification can establish a change in conditions or mistake in determination of fact.

Where mistake of fact forms the grounds for the modification request, new evidence is not a prerequisite, and mistake of fact may be corrected whether demonstrated by new evidence, cumulative evidence or further reflection on evidence initially submitted. § 725.310(c); *Kovac v. BCNR Mining Corporation*, 16 BLR 1071 (1992), *modifying* 14 BLR 1-156 (1990). Change in condition as an alternate ground for modification focuses on whether there has been a worsening of the miner's pulmonary disease to the point that it is now totally disabling. In determining whether the miner has established a change in condition, the administrative law judge must conduct an independent assessment of the newly submitted evidence, in conjunction with the evidence previously submitted to determine if the weight of the new evidence is sufficient to establish the element or elements which defeated entitlement in the prior decision. *Napier v. Director, OWCP*, 17 BLR 1-111 (1993).

The record includes the evidence set forth in Judge Kaplan's prior determinations of July 24, 1995 and April 16, 1998 and those discussions are incorporated by reference herein (DX 47, 86). Claimant's Exhibits 1 through 4 and Director's Exhibits 1 through 101 were admitted at the hearing¹. In addition to the evidence previously submitted, the following newly submitted evidence is now included in the record:

Dr. Kraynak stated in a letter dated September 23, 2000 that he had reviewed the Decision and Order of April 16, 1998. Regarding the non-conforming pulmonary function studies upon which he based his conclusion, he stated he felt they were qualifying studies and could be credited, and he noted he particularly credited the April 7, 1997 results (the only study Judge Kaplan found was valid). Dr. Kraynak also stated he was aware of the miner's other medical conditions, including his prior CVA (coronary vascular accident or stroke) which would "give him total disability" but which would not, however, affect his pulmonary function. Dr. Kraynak stated it was his opinion that the miner was totally and permanently disabled due to coal workers' pneumoconiosis irrespective of his other medical conditions which do not impact on his pulmonary condition (DX 98).

At a deposition taken on May 25, 2001, Dr. Kraynak stated he had been Claimant's treating physician since 1983 although for the last three years he had examined Claimant only in his car at the curb near his office. He explained that because Claimant is

¹ Claimant also submitted Claimant's Exhibits 5 and 6 at the hearing, a medical review report by Dr. D. Prince and Dr. Prince curriculum vitae. Since these were submitted within the 20 day rule, Claimant decided to withdraw these exhibits rather than allowing the Director and opportunity to respond with a new record review.

debilitated he examines Claimant in the car since it is difficult for Claimant to get into his office. Dr. Kraynak takes Claimant's blood pressure and reviews Claimant's medications. Dr. Kraynak also testified he does not have any records from Claimant's hospitalizations for his prior stroke or cardiac problems, nor does he have any reports from physicians treating the other medical conditions. Dr. Kraynak did not treat Claimant for the stroke nor does he have any records or information related to the prior stroke. Dr. Kraynak also stated Claimant's primary disability is shortness of breath due to coal workers' pneumoconiosis and the other significant problems do not give rise to the severe disability of a pulmonary nature that he has. He further stated the miner's cardiac impairment did not cause his respiratory disability nor did the paralysis from his stroke have any affect on his breathing symptoms (CX 4).

On May 16, 2001, Dr. J. Simelaro reviewed the medical evidence of record, including the newly submitted letter of September 23, 2000 by Dr. Kraynak. Dr. Simelaro noted the miner's complaints, his prior history of arteriosclerotic heart disease with cardiac impairment and atrophy of the right lower extremity from a stroke in 1992 which caused paralysis on the right side, aphasia or loss of the ability to speak, and dysphagia or trouble with swallowing. Dr. Simelaro agreed the chest x-ray readings showed the presence of pneumoconiosis, category 1/1 and he stated the pulmonary function study values declined after the miner quit smoking. Dr. Simelaro then concluded the miner's cigarette smoking history started the process of obstruction in the miner's lungs, but coal dust exposure finished this problem causing the pulmonary disability. He also stated the miner's stroke and arteriosclerotic heart disease did not add to the decrease in the miner's pulmonary function but did contribute to his overall disability (CX 1). In a supplemental letter dated May 16, 2001, Dr. Simelaro reiterated his conclusion that pneumoconiosis was a significant contributing factor to the miner's respiratory disability and along with his history of cigarette smoking, it has caused permanent disability (CX 3).

On review of the newly submitted evidence, I find no basis for modification of the prior denial. Initially, I note that Dr. Kraynak's letter of September 23, 2000 merely restated his earlier opinions and provided no basis for a finding of mistake in fact in the earlier denials as affirmed by the Board nor a basis for a finding of a change in condition since the prior denial. While Dr. Kraynak disagreed with the conclusions reached by Judge Kaplan and the Board in the prior denials, he provided no additional evidence in the letter of September 23, 2000 regarding Claimant's medical condition. In his deposition statement of May, 2001, Dr. Kraynak again reiterated many of his earlier opinions. Although he stated he examines Claimant every three months, he also stated these examinations are conducted in Claimant's car and do not involve any laboratory testing, but merely provide him the opportunity to listen to Claimant's heart and lungs and review medication. Despite Dr. Kraynak's assertion that he is Claimant's treating physician, however, he has no records of Claimant's prior hospitalizations for stroke or cardiac problems, nor does he know who Claimant's treating physician is or was for those

conditions.

Upon review of the medical reports over the long history of this case, Dr. Kraynak's opinions state similar findings and rely upon the same unreliable pulmonary function study results. Neither Dr. Kraynak's reports nor his deposition testimony provide a thorough and informative discussion of Claimant's complex medical condition, including his prior stroke and arteriosclerotic heart disease. Furthermore, Dr. Kraynak does not provide any basis for his conclusory statements that Claimant is totally disabled by pneumoconiosis. In light of all these continued omissions, particularly in light of Dr. Kraynak's failure to adequately discuss or document in his own records Claimant's prior stroke and arteriosclerotic heart disease, I find his opinions are neither well reasoned nor well supported. Under such circumstances, his opinions provide no basis for modification since they fail to establish any mistake in fact nor do they establish any change in conditions.

Likewise, Dr. Simelaro reviewed the medical evidence of record before Judge Kaplan and the Board as well as the September 23, 2000 letter of Dr. Kraynak. While Dr. Simelaro reached a different conclusion on review of that evidence than Judge Kaplan did in the prior denial of benefits, his opinion did not include any basis for a finding of mistake in fact in that determination. Dr. Simelaro relied, in part, on results of non-conforming pulmonary function studies as a basis for his conclusion as to the causation of the miner's pulmonary disability (stating that the changes in these studies after cessation of cigarette smoking showed a developing disability due to coal dust exposure). I find to the extent Dr. Simelaro relied upon these non-conforming studies his conclusion is neither well reasoned nor well supported. Furthermore, he does not illuminate any mistake in Judge Kaplan's review of the evidence in denying the prior claim or in the Board's consideration of the evidence in affirming that denial. Finally, since he does not consider any new evidence, his opinion can not provide any basis for a finding of change in Claimant's condition since the prior denial.

Dr. Simelaro states generally that Claimant's prior stroke did not lead to any decrease in pulmonary function. Dr. Simelaro further stated that strokes do not hamper the results of pulmonary function studies "unless they hit the respiratory center which would have killed the patient instantaneously". In light of the fact this Claimant was paralyzed on the right side by this stroke, is unable to talk and has difficulty in swallowing due to this stroke, Dr. Simelaro's cursory and general statements are not sufficient to adequately discuss the impact this serious stroke had on the miner's pulmonary function. Upon consideration of the fact this stroke caused extensive limitations for the miner including paralysis, inability to speak and difficulty swallowing, I find Dr. Simelaro's statement that this stroke did not affect the miner's pulmonary function without more complete discussion of the particular findings in the medical record upon which this statement is based or without citation to medical authorities to support his statement that strokes do not hamper the results of pulmonary function studies to be insufficient as a basis for establishing that the pneumoconiosis was the cause or a substantially contributing cause of the miner's

pulmonary disability. Dr. Simelaro's statements are neither well supported nor well reasoned.

Thus, I conclude the newly submitted evidence offers no basis for any finding of mistake in the prior denials by Judge Kaplan as affirmed by the Board. In addition, the newly submitted evidence offers no basis for a finding of change in condition since no "new" medical reports have been submitted. Dr. Kraynak's letter and deposition testimony reiterates his earlier findings and provides no new medical findings on examination or on laboratory study which demonstrate any change in the miner's condition. Dr. Kraynak does refer to on-going treatment and examinations conducted in the miner's car, however, these references are not supported by any specific new clinical findings and certainly are not supported by any objective laboratory test results. Furthermore, as noted above, Dr. Kraynak's cursory statements regarding Claimant's complicated medical condition and his failure to consider any medical reports from Claimant's other physicians results in a conclusion that neither his testimony nor his written reports are well reasoned nor well supported. It should be noted that Dr. Kraynak's reports throughout this case lack the thoroughness, specificity and the comprehensiveness one would expect from a truly committed treating physician. His reports and testimony, which lack information noted above do not establish a close relationship to the Claimant and his ongoing treatment. Although the duration of the relationship is over many years, the lack of complete information and conforming laboratory tests over this period of time considered in conjunction with the cursory examinations Dr. Kraynak has conducted in recent years indicates a relationship that does not merit special consideration.

Thus, I find the medical opinion reports of Dr. Kraynak and Dr. Simelaro insufficient to establish total disability due to pneumoconiosis or to establish a change in conditions since the prior denial or a mistake in fact in the prior denials. Accordingly, I find Claimant has not established total disability due to pneumoconiosis under the provisions of subsection 718.204(a). Thus, he has not established any basis for finding a change in condition since the prior denial nor has he demonstrated any mistake in fact in the prior denial on the issue of total disability due to pneumoconiosis. In comparing all the like and unlike evidence of record, both the evidence in the prior determination as well as the evidence submitted subsequent to the Claimant's motion for modification, I find the same insufficient to establish that Claimant is totally disabled due to pneumoconiosis. Accordingly, Claimant's request for modification of the denial of benefits shall be denied, and the denial of benefits shall remain.

Attorney's Fee

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered to the Claimant in pursuit of this claim.

ORDER

Claimant's request for modification of the denial of benefits issued most recently on April 16, 1998 and affirmed by the Benefits Review Board on September 29, 1999 is denied. The claim for benefits remains denied.

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PAUL H. TEITLER

Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20018-7601. A copy of this notice must also be served on Donald S. Shire, Associate Solicitor, Room N-2605, 200 Constitution Avenue, N.W., Washington, D.C. 20210.